Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	)	WC Docket No. 09-152

COMMENTS OF QWEST COMMUNICATIONS COMPANY, LLC

Qwest Communications Company, LLC ("Qwest") hereby files these comments on a Petition for Declaratory Ruling filed by Great Lakes Communication Corp. and Superior Telephone Cooperative ("Great Lakes").[1] Contrary to the thrust of the Petition, it is premature and unwarranted to preempt a future written order of the Iowa Utilities Board arising from its investigation of traffic pumping in the State of Iowa.

The Iowa Utilities Board has almost completed a two-year investigation of traffic pumping within the State of Iowa. This investigation included examination of a number of critical issues, including whether traffic pumping "free service providers" are end-user customers under Iowa local exchange and intrastate access tariffs, and whether the traffic pumping LECs used forged evidence in an attempt to mislead the Board, the FCC and Qwest. While the Board has met, announced that it has reached a decision on the issues, and presented and described the anticipated content of the still-to-be drafted order, the Board has not yet released the written order that Great Lakes requests be preempted.[2]

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[1] Public Notice, "Comments Sought on Petition for Declaratory Ruling and Contingent Petition for Preemption of Great Lakes Communication Corp. and Superior Telephone Cooperative", WC Docket No. 09-152, DA 09-1843 (Aug. 20, 2009).

[2] The matter before the Iowa Utilities Board is *In Re: Qwest Communications Corporation v. Superior Telephone Cooperative, et al.*, Docket No. FCU-07-2, State of Iowa, Department of Commerce, Iowa Utilities Board. Effective January 2, 2009, Qwest Communications Corporation changed its name to Qwest Communications Company, LLC.

Unwilling to wait for the actual Iowa Board Order, Great Lakes asks that the FCC preempt the Iowa Utilities Board's anticipated written order based on an inaccurate description of the issues before the Board, the Board's open meeting and its speculation as to what will be in that order. Such action would be premature and unsupportable. There is nothing in the Great Lakes Petition that in any way indicates that the Iowa Utilities Board has exceeded the limits of its jurisdiction under Iowa law, or that it has in any way intruded on the jurisdiction of this Commission. The FCC should not interfere with the lawful jurisdiction of the Iowa Board over state telecommunications matters based on the unsupportable assertion that the Iowa Utilities Board might issue an order so inconsistent with the FCC's own ability to carry out its statutory mandate as to warrant preemption. Rather, as in prior situations, because the arguments for preemption are "speculative," the Commission should decline to preempt.[3] Where, as here, arguments about the consequences of an Iowa Utilities Board decision are "unclear," the Commission should determine that preemption is "premature" and thereby avoid a potentially unnecessary "jurisdictional confrontation."[4] If a proper petition is filed in the future, the

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[3] *See, e.g., In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 12 FCC Rcd 22665, 22732 (1997) (preemption rejected because it would be "premature and speculative"; *In the Matter of United Cable Television of Colorado, Inc.,* 1 FCC Rcd 555, 558 ¶ 27 (1986) ("[t]he alleged affects upon interstate communications and federal law and policy are too speculative and uncertain to warrant preemption[]") (citation omitted); *Petition for Declaratory Ruling by RadioCall Corp.,* 92 FCC 2d 160, 164 ¶ 10 (1982) ("[p]etitioner's arguments as to entry regulation are speculative and are [thus] not a compelling basis for the assertion of preemptive federal jurisdiction in this case[]").

[4] *In the Matter of Mountain States Telephone and Telegraph Company Preemption of and Jurisdiction Over Tax Reserves and Investment Tax Credits Transferred to AT&T and Affiliated Companies*, 2 FCC Rcd 6069, 6070 ¶ 12 & n.18 (1987). *See also* Memorandum to the Heads of Executive Departments and Agencies from President Barack Obama (May 20, 2009) (emphasis added) ("The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with *full* consideration of the legitimate prerogatives of the States ...."), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption.

Commission can analyze it on the basis of an accurate record.

Great Lakes itself has essentially confirmed the fact that its Petition is premature in a recent filing before the Iowa Utilities Board. Qwest had initially read the Great Lakes' Petition as seeking broad-sweeping preemption of the Iowa Utilities Board. However, in response to Qwest's Response to the Great Lakes' stay petition in Iowa, Great Lakes conceded that the Iowa Utilities Board has jurisdiction over at least some of the issues before the Iowa Utilities Board, claiming that "Movants have not argued to the FCC that the Board 'is without jurisdiction to decide the issues in this case.'"[5] Instead Great Lakes tells the Iowa Board that its FCC Petition is "asking only for clarification from the FCC as to which matters the Board may rule on, and which not."[6] This is not a proper use of a preemption petition, which should be decided based on the action that is actually taken by the State.

The Petition should either be dismissed or summarily denied.

Respectfully submitted,

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September 21, 2009

[5] Great Lakes Communication Corporation and Superior Telephone Cooperative Reply in Support of Motion to Stay Proceedings, at 3, filed Sept. 1, 2009 (Iowa Utilities Board, Docket No. FCU-07-02). A copy of the Great Lakes filing is attached hereto as Exhibit A. Attached as Exhibit B is the Qwest Response to the Stay Petition.

[6] Great Lakes Reply at 4.

EXHIBIT A

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

In re: Qwest Communications Corp., Complainant, v. Superior Telephone Cooperative, *et al.*, Movants.	Docket No. FCU-07-2

GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

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Great Lakes Communication Corp. and Superior Telephone Cooperative, collectively the "Movants," hereby reply to the three pleadings filed August 28, 2009, in resistance[1] to the Motion to Stay Proceedings filed August 17, 2009 ("Motion"). Movants have sought leave to file this reply principally in order to address allegations that they have deliberately misled the Iowa Utilities Board (the "Board") in seeking a stay of proceedings until the Federal Communications Commission ("FCC") resolves the Petition for Declaratory Ruling and Contingent Preemption ("FCC Petition"). These allegations cannot stand and Movants should be permitted to disprove them.

DISCUSSION

I. MOVANTS HAVE COMPLIED WITH ALL DISCOVERY, TESTIMONY, AND BRIEFING OBLIGATIONS IN THIS CASE

Qwest suggests that the Motion is simply another "antic" to "delay" the resolution of this case, and that "Respondents have done everything in their power from acquiring the evidence, and to prevent the Board from evaluating the evidence and issuing a decision." Qwest Response at 1, 5. Qwest does not define "Respondents," and Movants sincerely hope that Qwest is not referring to their conduct in this case, for as to Great Lakes and Superior no accusation of stonewalling would be proper.

Great Lakes and Superior responded timely responded to five rounds of discovery from Qwest, including permitting Qwest access to their respective central offices for an inspection that, as Qwest's own evidentiary presentation and briefs show, proved worthless. The continuance of the hearing in this case was never requested by either Movant, and Movants have

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[1] Qwest's Response to Great Lakes and Superior Telephone's Motion to Stay Proceedings, Supplemental Motion, and Aventure Joinder (Aug. 29, 2009) ("Qwest Response"); AT&T's Opposition to Motion to Stay Proceedings (Aug. 28, 2009) ("AT&T Opposition"): Sprint's Resistance to Great Lakes' Motion to Stay (Aug. 28, 2009) ("Sprint Resistance").

never asked this Board for an extension of time to comply with the post-hearing schedule. Qwest's broadbrush characterization of "Respondents," if it intends to include Great Lakes and Superior, is baseless.

Moreover, it is Qwest who sought to impede discovery by Movants in this case. After Qwest had inspected each of their central offices, Movants timely filed Notices of Deposition for the two Qwest personnel who performed the inspections. These persons plainly acquired knowledge about Movants that Qwest intended to use in its case in chief. As such, Movants were entitled to depose these persons.

Qwest moved to quash Movants' deposition notices, lodging objections of relevance and privilege. Qwest Motion for Protective Order Against Depositions of Randy Struthers and Betty Lee (Oct. 27, 2009). The Board denied Qwest's motion on November 24, 2009, finding that "the Respondents ... are entitled to access to these witnesses, whose impressions have been relied upon by QCC in its rebuttal testimony[.]" Order Denying Motion for Protective Order at 3-4 (Nov. 24, 2008). Qwest's attempt to keep Movants from deposing persons whose factual knowledge was relevant to this case was thus deemed baseless by the Board. Therefore, as between Qwest and Movants, plainly it is Qwest that is the party who sought to block attempts to conduct proper discovery. Qwest's *ad hominem* attack on "Respondents" is thus misplaced and inappropriate.

II. MOVANTS HAVE SATISFIED ALL FOUR PRONGS OF IOWA CODE § 17A.19(5)(c)

Movants amply demonstrated, in accordance with Iowa Code 17A.19(5)(c), that they (1) are likely to prevail on the merits of the FCC Petition, (2) will suffer irreparable harm absent a stay, (3) the IXCs will suffer no harm upon entry of a stay, and (4) the public interest strongly favors a stay. Motion at 3-5. The IXCs' responses quite miss the mark on each prong,

and instead resort to accusations of "misrepresentations" or to reliance on a finding of "illegality" that only underscores why a stay is warranted.

A. Qwest's Own Requests for Relief, and the Board's Grant of Much of That Relief, Include Matters of Interstate Telecommunications and Thus Movants Are Likely to Succeed on the Merits of Their FCC Petition

Movants have demonstrated that they are likely to prevail on their FCC Petition on the basis of Qwest's own requests for relief and the Board's public statements on August 14, 2009. Motion at 4-7 (citing, *inter alia*, *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568 (8th Cir. 2004)). Qwest accuses Movants of making deliberate misrepresentations of these items, and thus Movants must respond by providing, again, the exact language of Qwest and the Board that incited the FCC Petition in the first instance. Far from merely "affecting" interstate communications, as AT&T concedes (AT&T Opposition at 2), the Board's vote on August 14, 2009, shows that the decision in this case directly affects interstate access tariffs, terms, conditions, and revenue.

As an initial matter, Movants have not argued to the FCC that the Board "is without jurisdiction to decide the issues in this case." Qwest Response at 1. Even a cursory reading of the FCC Petition refutes that allegation. Movants have explained to the FCC that Qwest's claims in this case include matters of **interstate** telecommunications and thus exceed the Board's jurisdiction. For example, Qwest has requested findings that:

- "[T]he LECs are not entitled to any compensation for the calls delivered to numbers associated with FCSCs because that calling is outside of the switched access tariffs." Qwest Proposed Finding of Facts and Conclusion of Law No. 20 ("Qwest FFCL").

- "[T]he arrangements between the LEC Respondents and the FCSCs to obtain and share revenues from long distance carriers through the offering of free calling services constitute unjust and unreasonable practices and constitute violations of the public interest and the LEC Respondents' certifications." Qwest FFCL No. 23.
- "Great Lakes and Aventure failed to satisfy the rural exemption and the facts that took them outside of the exemption were well known to them." Qwest FFCL No. 24.
- "The Board orders the LECs to immediately cease and desist sharing of access revenues with FCSCs and to immediately disconnect the telephone numbers associated with such services." Qwest FFCL No. 31.

The plain language of these items includes no differentiation between intrastate access and interstate access. By any reasonable reading of Qwest's papers, Qwest is seeking relief for interstate calling traffic. Movants thus have misrepresented nothing to the Board or to the FCC.

Movants never told the FCC that ***all*** of Qwest's claims affect interstate communications. *See* Qwest Response at 6 (listing Proposed Findings of Fact that Movants "fail[ed] to mention"). Had Movants believed otherwise, the FCC Petition would seek to enjoin the Board from issuing any ruling at all. Plainly the FCC Petition is more circumscribed than that, asking only for clarification from the FCC as to which matters the Board may rule on, and which not. Qwest's unhelpful hyperbole is simply not the reality of this case or of Movants' efforts at the FCC.

The rural exemption issue requires specific address. Here Qwest's honest response shows the merits of Movants' FCC Petition and its motion to the Board. It admits that

"Qwest firmly believes that the Board can make findings that show these LECs do not satisfy the rural exemption[.]" Qwest Response at 9.[2] This statement comports with the consistent testimony of Qwest's witnesses who always have asserted that Great Lakes' **interstate** termination rate, in its **interstate access tariff**, is too high. *E.g.*, FCU 07-2 Hearing Tr. at 1070:10-12 (Eckert). Qwest should not have brought this argument to the Board, and the Board should not rule on it. The Board's willingness to hear it, however, evidences an intent to consider rural exemption eligibility — a matter solely within the FCC's jurisdiction — in this case. This issue is one of many that undeniably has been made part of this case, and it is one that *Louisiana PSC* prohibits the Board from addressing.[3] Qwest should have, but did not, raised this rural exemption matter at the FCC.

Sprint's curious statement that *Louisiana PSC* favors the IXCs merits some address. Sprint Resistance at 3-4. Sprint feigns "surprise" that Great Lakes and Superior rely on this case. *See id.* at 4. Yet *Louisiana PSC* speaks directly to this proceeding, precisely because, as Sprint notes, it dealt with the state-federal dichotomy in telecommunications regulation. As such, the Supreme Court's analysis is directly instructive to the Board: *Louisiana PSC* explains that there are limits to what State Commissions may do when regulating intrastate communications, in order not to impede on matters of exclusive FCC interstate jurisdiction. *See* FCC Petition at 21-26. That distinction is at time blurred in this case, but often completely ignored. Movants thus rely on *Louisiana PSC* precisely in order to ensure that the state-federal

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[2] Movants are not sure which entities are included in the phrase "these LECs" which Qwest never defines. Superior is a rural ICO and its interstate terminating access has never veered from the NECA rate, and thus as to Superior the rural exemption is irrelevant.

[3] *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986) ("Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, ... when there is outright or actual conflict between federal and state law, ... where compliance with both federal and state law is in effect physically impossible[.]").

boundaries are respected and that the federal issues — including Qwest's calls for tampering with the LECs' interstate access revenue — are appropriately culled out.

The FCC Petition was a necessary filing. If anything, the Board should view the FCC Petition as a helpmeet that will give the Board further comfort that the relief Qwest has demanded should not have been granted here. Thus, when Qwest seeks a finding that "Great Lakes is not entitled to switched access for any of its calls," Qwest FFCL No. 18, the Board will have obtained the instruction from the FCC that the Board cannot grant that relief insofar as "***any*** of its calls" includes interstate traffic. Unfortunately, however, the Board's statements during the public meeting held on August 14, 2009, indicate that it is granting much of that relief. Movants have thus sought the FCC's necessary input now, in order that the Board can correct such errors and possibly avoid appeal. With the Petition already having been put out for comment on an expedited schedule, Supplemental Motion Exh. A., the Board has nothing to lose by waiting for the FCC's decision.

B. The IXC Responses Themselves Demonstrate Movants' Irreparable Harm

Movants explained that they will suffer irreparable harm if the Board proceeds with its order that plainly will include matters of interstate jurisdiction. Motion at 7-8. Qwest's claim for relief includes a *nunc pro tunc* blessing on its failure to pay millions in lawfully accrued terminating access. The IXCs cannot refute that these monies represent a "'significant revenue stream.'" AT&T Opposition at 3 (quoting Motion at 7). As such, the IXCs resort to the callous assertion that "the IXCs have for years withheld payment of access and the movants have continued to operate[.]" *Id.* at 13. The papers read as though the IXCs are disappointed by that fact.

Qwest's chief argument regarding the Movants' showing of harm is inapposite: "Great Lakes' business is based wholly on unlawful conduct." Qwest Response at 20. Sprint goes so far as to compare Great Lakes to a bank robber. Sprint Resistance at 6. Qwest and Sprint plainly have aimed to put Great Lakes out of existence. These arguments demonstrate that the IXCs' goal in this case is drive to drive LECs out of the market and, according to the Board's statements on August 14, it appears the IXCs are poised to succeed. The IXCs' responses thus demonstrate exactly why Movants satisfy the "irreparable harm" prong of Iowa Code § 17A.19(5)(c): the relief in the order may well destroy their businesses. The IXCs' own anticipation of this result forms exactly the situation for which stays are entered. Motion at 7 (citing, inter alia, *Ahmed v. U.S.*, 47 F. Supp. 2d 389, 400 (W.D.N.Y. 1999) (Store owner's averment that administrative sanctions would force him out of business was sufficient to establish irreparable harm); *American Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 123 (D.Conn. 1992)).

C. The IXCs Are Unable to Refute That They Will Not Be Harmed By a Stay, Having Already Withheld Terminating Access Payments from the LECs for Years

Movants demonstrated that the IXCs will not be harmed by a stay, because the IXCs already stopped paying terminating access almost three years ago. Motion at 8. Qwest, AT&T and Sprint have no answer to this argument. At most, they will endure a few months' wait to obtain, in final form, the ruling they seek — that their self-help refusal to pay, without the approval of any court or agency, was permissible. None of the IXCs can make any meaningful showing of harm; indeed, Qwest devotes only four sentences of its Response to this prong of Iowa Code § 17A.19(5)(c). Qwest Response at 20.

Further, Qwest's assertion that the FCC has "delayed" or "extended" the comment cycle on the FCC Petition is preposterous. Qwest Response at 21. No delay has occurred. The FCC released the Public Notice seeking comments only 6 calendar days after the FCC Petition was filed. Rarely, if ever, has the FCC put a Petition for Declaratory Ruling out for comment so quickly. Qwest's assertion that "under FCC rules" all responses to the Petition were due August 24 are false, and it is telling that Qwest provides no cite to these purported "FCC Rules." Qwest Response at 21. Qwest's counsel plainly does not understand FCC procedure. Petitions for Declaratory Ruling have no codified deadline for response; the FCC puts them out for comment under a schedule that is crafted for each Petition. Here, it took just 6 days for that action to happen.

The fact that the FCC allowed interested persons 30 days to file comments is more an indication of its acknowledgement of the upcoming federal holiday than anything else. Indeed, in related litigation Qwest's counsel has requested filing extensions for every item in the last six months, citing family vacations and other hardships. Qwest is incorrect in characterizing the FCC proceeding as "delayed" at all, and the Board should not accept that characterization in its consideration of the Motion to Stay. All indications are that the FCC will act swiftly. The IXCs' protestations that a stay would inflict harm therefore are unsupportable.

D. The Public Interest Favors a Stay Over the Needless Expenditure of Resources In Implementing an *Ultra Vires* State Commission Order

Movants have demonstrated that, as the FCC Media Bureau found in *Charter Communications*, the public interest weighs heavily in favor of delaying entry of a final order unless and until it is deemed not to infringe interstate communications. Motion at 8-9 (citing *Charter Communications Entertainment I, LLC*, 22 FCC Rcd. 13890 (2007)). The plainly interstate nature of the "relief" Qwest seeks, in its own words, in this case shows that the Board

is being urged to overstep its authority; the Board's announcement on August 14 that it grants the relief indicates that it already has decided to make that leap. As such, the order is unlawful. Movants thus explained, in accordance with *Charter Communications*, that "[p]lainly the public would not be served by the Board's overseeing compliance with an *ultra vires* directive." Motion at 8.

The IXCs are unable to explain why *Charter Communications* is not persuasive authority for the proposition that stays are appropriate to prevent the waste of resources which occurs when regulated entities are made to comply with *ultra vires* state orders. Qwest and AT&T do not even address *Charter*. *See* Qwest Response at 20-21; AT&T Opposition at 13-14. Sprint attempts to distinguish *Charter* on the ground that it regards cable service, not telephone service. Sprint Resistance at 2-3. Certainly Sprint's was not a serious argument. The IXCs thus have no answer to Movants' argument that the public interest will be best served by a stay of this case in order to ensure that whatever order issues will be of appropriate scope.

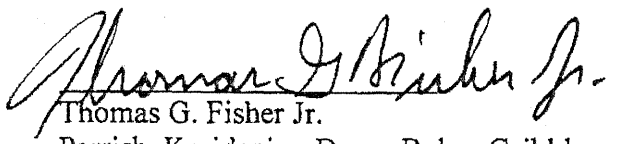
Finally, AT&T's and Sprint's argument that the phone calls — which are being placed by their own retail long distance customers — "clog up" the network is specious. First, the record demonstrates that many LECs have ceased relationships with conference call and chat line providers due to the burdens of this case and the fact that the IXCs ceased paying terminating access years ago. Secondly, it does not lie in Sprint's mouth to assert that increased call traffic has forced Sprint to augment its network, Sprint Resistance at 7, because Sprint routinely refused to do so. Indeed, the Board has found that Sprint actually blocked traffic to some LECs. Sprint's protestations of harm to the network are thus not credible.

CONCLUSION

For all these reasons, the Board should stay all further proceedings and abstain from issuing a final order pending the FCC's consideration of Movants' Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption.

September 1, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of September, 2009, served the foregoing **GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS** upon each of the following persons as required by the rules of the Iowa Utilities Board:

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EXHIBIT B

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: QWEST COMMUNICATIONS CORPORATION, Complainant, v. SUPERIOR TELEPHONE COOPERATIVE, *et al.*, Respondents.	DOCKET NO. FCU-07-02

QWEST'S RESPONSE TO GREAT LAKES AND SUPERIOR TELEPHONE'S MOTION TO STAY PROCEEDINGS, SUPPLEMENTAL MOTION, AND AVENTURE JOINDER

Qwest Communications Corporation, n/k/a Qwest Communications Company, LLC ("Qwest"), opposes Great Lakes' and Superior Telephone's motion to stay the Board's issuance of a written order, and Aventure Communication's joinder in that motion. Throughout this case, the Respondents have done everything in their power to prevent Qwest from acquiring the evidence, and to prevent the Board from evaluating the evidence and issuing a decision. The Board has rejected numerous motions that, at their core, sought to ensure the details of Respondents traffic pumping scheme remained a secret. Now that the Board is about to issue an order revealing many ways in which the traffic pumping scheme is illegal, the Movants jump on the same tired horse and argue, yet again, that the Board is without jurisdiction to decide any aspect of traffic pumping. Traffic pumping is premised on manipulation of the LEC's local exchange services, local exchange certificates and local exchange tariffs. Indeed, access charges cannot be assessed unless the call traverses a "common line" ordered out of the LEC's local exchange tariff. The Board is uniquely suited to interpret the Respondents' local exchange tariffs, to determine whether the FCSCs are end users under those tariffs, and to address many other aspects of traffic pumping. Despite this clear jurisdictional authority, Great Lakes and Superior filed a Petition with the Federal Communications Commission claiming the Board is without jurisdiction to decide the issues in this case,

and now seek a stay based on the Petition. The stay request fails unless the Board concludes, among other things, the Movants have proven they have a "likelihood of success on the merits," which would require the Board to overrule – with no persuasive reason to do so from the Movants – several earlier decisions finding it has jurisdiction to hear the issues in this case. Not only have the Movants fallen woefully short of the legal standard, their arguments to the FCC are based on misrepresented facts. The Motion is just another in a long series of transparent attempts to delay a decision on the merits. The motion to stay is a ruse, and should be denied.

I. LEGAL STANDARD: THE MOVANTS BEAR THE BURDEN OF PROVING FOUR CRITERIA TO OBTAIN A STAY.

The relief Movants seeks is not even contemplated by rule. The Board rules contain a standard to stay final orders, but do not contemplate staying an order before it issues. The rule states:

> 199 IAC 7.28 Stay of agency decision.
>
> 7.28(1) Any party to a contested case proceeding may petition the board for a stay or other temporary remedy pending judicial review of the proceeding. ...
>
> 7.28(2) In determining whether to grant a stay, the board shall consider the factors listed in Iowa Code section 17A.19(5)(c).

199 IAC § 7.28(1), (2) (in relevant part). Section 17A.19(5)(c) identifies four criteria that the party seeking the stay must prove in order to obtain a stay of agency decision upon judicial review:

> (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
>
> (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
>
> (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
>
> (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Iowa Code § 17A.19(5)(c) (in relevant part). *See, e.g., Midwest Renewable Energy Projects LLC v. Interstate Power and Light Co.*, 2006 WL 3041697, *3 (I.U.B. July 7, 2006) ("while the Board is not explicitly bound by the four-factor test when ruling on a stay application, the Board has nevertheless found it appropriate to use the test in such rulings.").

The very lack of a statute or rule contemplating a stay of an incipient order is itself persuasive that such a stay is improper, or at least requires unusual circumstances. Movants' Petition to the FCC raises the same meritless jurisdictional arguments that the Board has considered and rejected, and in addition, goes so far as to claim that the Board does not have jurisdiction regarding local exchange services, LEC certification requirements, the conduct of LECs' certified under the Board's authority, public interest and intrastate access. Far from presenting any unusual circumstances to justify a stay of the planned order, the Motion is simply a vexatious multiplication of the proceedings, the purpose of which is delay the day of judgment.

II. THE IOWA BOARD HAS CLEAR JURISDICTION TO HEAR THIS CASE, AND TO ISSUE THE ANTICIPATED FINDINGS AND CONCLUSIONS.

Great Lakes and Superior have no chance of success on the Petition because the issues that the Board will resolve in the order are matters of local exchange service, Iowa law, certification requirements, public interest requirements, and intrastate access traffic. These are issues under the Board's exclusive jurisdiction. Great Lakes and Superior fill the Petition with misrepresentation upon misrepresentation, in a desperate attempt to make it appear that the Board is acting in an extra-jurisdictional manner. Movants cannot show that a stay is warranted on any grounds.

A. Movants Premise Their FCC Petition and Motion to Stay On The Same Jurisdictional Arguments the Board Has Already Rejected.

From the outset of this case, the Respondents argued that the Board does not have jurisdiction to hear the issues in the case, and the Board has consistently found otherwise. In its May 25, 2007 Order denying several motions to dismiss, the Board found it had jurisdiction to hear the case:

> The Board finds that there are genuine issues of material fact regarding the revenue sharing arrangements and the Respondents' local and intrastate access service tariffs. The Board also finds that it has the authority to hear QCC's complaint as it relates to intrastate traffic. The Board is aware of its jurisdictional limits with respect to interstate and international traffic, which is at issue in various proceedings before both the FCC and federal courts. However, the Board finds that it is appropriate for the issue as it relates to intrastate traffic to be before the Board at this time.

May 25, 2007 Order at 12. Despite this finding and other orders stating it had jurisdiction to hear the issues in this case, in October 2007, the LEC Respondents moved to stay the case due to issuance of the first *Merchants* decision. The Board rejected this request stating:

> The Board has reviewed and considered the Respondents' request and QCC's response and finds that a stay of this proceeding is unnecessary and inappropriate, but an extension of the filing deadlines and hearing by approximately 90 days is appropriate. The Board agrees with the Respondents that the FCC's decision in its reconsideration of the FCC complaint is likely to be instructive to the Board's decision in this proceeding. ***However, the Board also agrees with QCC that the Board has jurisdiction to hear the full context of this case and to determine the issues brought by QCC regarding intrastate traffic and the Respondents' local exchange tariffs.*** As such, the Board finds that a stay of this proceeding pending the FCC's determination is unnecessary.

Id. at 4-5 (emphasis added). In seeking a stay, Movants raise the exact same arguments; indeed, in many instances cite the exact same authorities, that the Board has already considered and rejected.

B. The Board's Incipient Order Is Fully Authorized by the Iowa Legislature's Delegation of Authority to the Board.

The Board's jurisdiction over local and intrastate matters includes the authority to decide all of the issues that the Board intends to address in its written order. Traffic pumping depends upon the LECs' failure to adhere to local exchange tariffs, failure to provide local exchange services, manipulation of the LECs' certifications, inducement of illegal kickbacks, and manufacture of evidence in an attempt to falsely portray the FCSCs as local exchange customers all in violation of law. These matters are all well within the Board's regulatory province. Nonetheless, Movants cite to Qwest proposed findings and conclusions, and based on those, set forth 13 purported facts that they argue show the "jurisdictional overreach of the IUB." Notably, Movants ignore that the Board has already stated that it "will not consider" any party's proposed findings and conclusions. Order, July 7, 2009 at 5. In each instance, Great Lakes and Superior either misquote Qwest's proposed findings and conclusions, take the proposed findings out of context, and/or completely misapprehend the Board's jurisdictional authority. Before discussing each of the 13 points, a few clarifications are important.

The core issue in traffic pumping is whether the FCSCs are purchasing local exchange services from the LECs local exchange tariffs. The reason this is essential is because the Iowa LECs' access

tariffs – interstate and intrastate alike – only allow switched access charges when (among other things) the call traverses a "common line." NECA/ITA Tariffs § 17.1.2. The tariffs define "common line" as "a line provided under the business regulations of the general and/or ***local exchange service tariffs***." (emphasis added). NECA/ITA Tariffs at §2.6. The Iowa Board is uniquely qualified as the approving authority for the local exchange tariffs in question, to determine whether the FCSCs are end users of the LEC Respondents local exchange tariffs, or whether the subject calls traversed a line purchased from the LECs' local exchange tariffs. *See, e.g.*, Iowa Code §§ 476.1 ("The utilities board ... shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided."); 476.3 (LECs must charge in accordance with tariffs, and providing for complaint actions before the Board regarding "the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter"); 476.4 ("Every public utility shall file with the board tariffs showing the rates and charges for its public utility services and the rules and regulations under which such services were furnished... "). The Board also has authority over LEC certifications. Iowa Code § 476.29(1), (9) (Board authority over certifications); 476.101 (Board authority over CLECs). *See, e.g.*, 199 IAC § 22.1(1). The Board also has authority over public interest issues, whether a LEC's conduct is unjust and unreasonable, whether a LEC is discriminating, and whether a LEC's conduct is consistent with the public interest. Iowa Code § 476.3(1) (determine whether the LECs services or regulations are "unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law...."); 199 IAC § 22.1(1) (jurisdiction over discrimination and the public interest); Iowa Code § 476.101(1) (similar jurisdiction over CLECs). In sum, the Iowa Legislature has clearly vested the Board with authority to determine all of the issues on which the Board gave its oral conclusions at the decision meeting and which the Board plans to memorialize in its written order.

C. <u>As a Result of the Board's Clear Jurisdiction, Movants Misrepresent Facts to Make It Appear the Board's Order Will Go Too Far.</u>

Given the Board's plain jurisdictional authority, Movants attempt to justify their last minute antics by citing and misrepresenting proposed findings of fact and conclusions of law that Qwest

submitted to the Iowa Board on April 30, 2009 – four months ago. *See* FCC Petition at 11-12 (citing 13 bullets). Qwest's proposed findings are perfectly consistent with the relief that Qwest has sought during the entire two and one half years the case has been pending. The misrepresentations of the record are egregious. For example, in their FCC Petition, Great Lakes and Superior assert it is unclear whether the Board will order a refund of all access charges, or just intrastate access charges. Qwest has never sought, and the Board has never suggested it will order, a refund of interstate access charges. Qwest's proposed findings and conclusions make it clear Qwest only asks the Board to refund "intrastate" access charges. Qwest's Proposed Findings at p. 30.

Qwest's claims also required the Iowa Board to review and interpret the LEC's intrastate access tariffs. The intrastate access tariff used by most Iowa LECs is the Iowa Telecommunications Association ("ITA") tariff. The ITA tariff states that, with limited exceptions, the "regulations, rates and charges applicable to the provision of Carrier Common Line [and] Switched Access ... are the same as those filed in Exchange Carrier Association Tariff F.C.C. No. 5...." In other words, with few exceptions, the Iowa intrastate access tariff is identical to the NECA interstate access tariff. The Iowa Board is fully vested to review and interpret the intrastate access tariff, which requires it to review and interpret language from the NECA tariff.

Movants fail to mention these baseline facts and act as though presentation of language from the interstate tariff somehow soils the Board's proceeding. Great Lakes and Superior also fail to mention several of Qwest's key proposed findings and conclusions that make clear what Qwest seeks is squarely within the Board's jurisdiction, namely:

7. The Board finds that the FCSCs are not "end-users" ***under the LEC Respondents' local exchange tariff or any intrastate access tariff.***
8. The Board finds that the FCSCs are involved in a joint undertaking and therefore business partners of each other.
9. The Board finds that the FCSCs were wholesalers and or carriers, not end-users, and therefore calls delivered to FCSCs are not subject to switched access.
10. The Board finds that none of the calls in question terminated to an ***end-user premises as defined by the LEC Respondents' intrastate tariffs.***
11. The Board declares that to become an end-user premises under the access tariffs, that end users must either own, lease, or control a "building or building" or defined

portions of a "building or buildings," which necessarily requires a lease or ownership.

(emphasis added). Instead, Movants claim that these proposed findings regard "interstate and intrastate" access tariffs; in other words, they add language and then claim they are precluded by the Board's protective agreement from attaching Qwest's actual document. This is a plain attempt to mislead the FCC into preempting a decision simply because the Board's oral conclusions are unfavorable to Great Lakes and Superior, not because there is any genuine jurisdictional issue.

A detailed review of the relief Qwest actually seeks shows the Movants arguments as to each of the 13 items detailed in their FCC Petition (Pages 11-12) are completely baseless:

1. Movants claim Qwest the Board to find the FCSCs are not end users, and are not subject to "interstate and intrastate switched access charges." As cited above, Qwest asked the Board to find that the FCSCs are not "'end-users' ***under the LEC Respondents' local exchange tariff or any intrastate access tariff***", "are involved in a joint undertaking and therefore business partners of each other" and therefore are not "not subject to switched access." Nowhere does Qwest include the words "interstate switched access charges."
2. Movants state that the Board cannot find that "end users must own, lease or control a premises to be an "end-user premises." Once again, Qwest asked the Board to find that (a) the FCSCs are not end-users "***under the LEC Respondents' local exchange tariff or any intrastate access tariff***", (b) that the calls did not "terminate to an ***end-user premises as defined by the LEC Respondents' intrastate tariffs***" and, (c) to be an end user premises, the "end users must either own, lease, or control a 'building or building' or defined portions of a 'building or buildings,' which necessarily requires a lease or ownership." The Board certainly has the ability to make findings and conclusions that the FCSCs did not own, lease or otherwise control any defined space, and that this does not satisfy the requirements of "premises" set forth in the intrastate access tariffs.

3. Movants claim that the Board does not have authority to determine whether any of the international, credit card or pre-recorded playback calls terminated in Iowa. This is baseless. As an initial matter, several of the LEC Respondents claimed to "terminate" calls in an area where they were not certificated to provide local exchange services. Qwest asked the Board to find that these LECs (including Great Lakes and Superior) could not be providing local exchange services to the FCSCs to the extent the services were provided outside of their certificated exchanges. As stated above, the Board can very clearly decide this issue. Secondly, the evidence showed the international (etc.) calls were actually calls that were routed via VoIP to a distant location. In other words, a call from Des Moines, Iowa to Spencer, Iowa (where Great Lakes is located) forwarded to an international location would be billed to Qwest as an intrastate long distance call, but in reality that call never terminated at all in Iowa. The Board clearly has authority over this issue; moreover, Qwest cited the FCC's end-to end analysis to decide this issue, and the recommended finding that these calls do not terminate in Iowa is perfectly consistent with federal law.

4-5. Great Lakes claims that Qwest asks the Board to order a refund of all intrastate and interstate switched access based on recommended finding Nos. 18 and 20. In making these assertions they ignore part of recommended finding No. 18 and all of No. 19. In Recommended Finding No. 18, Qwest asks that the "Board finds that Great Lakes is acting beyond its certification and local exchange tariff by offering services in Spencer, Iowa. The Board also finds that, as a result, Great Lakes is not entitled to switched access for any of its calls, all of which are delivered to FCSCs." Therefore, Recommended Finding No. 19 states that "The Board finds that Qwest is entitled to ***recover intrastate switched access revenues*** as defined in this Order with interest." It is clear that Qwest is asking the Board to make findings regarding local exchange services and repayment of intrastate access.

6/8/11. Great Lakes and Superior claim the Iowa Board cannot find revenue sharing to be an "unjust and unreasonable" practice. Iowa Code § 476.3 provides the Board the authority to

determine that any practice by an Iowa LEC is "unjust, unreasonable, discriminatory or otherwise in violation of any provision of law." Thus, Iowa statute gives the Board express authority to determine whether the conduct of any Iowa certificated LEC is unjust and unreasonable. Moreover, the LEC Respondents were all using access charges – interstate and intrastate alike – to discriminate between purported end users of local exchange services. The Board has absolute authority over discrimination in the provision of local exchange services irrespective of the revenue stream for the discrimination.

7/9. Great Lakes and Superior claim the Board does not have authority to find those involved in traffic pumping fail to satisfy the rural exemption. While Qwest firmly believes that the Board can make findings that show these LECs do not satisfy the rural exemption, the Board has already stated it will limit its role on this issue. In its Decisional meeting on August 14, 2009, the Board stated:

> The question is should the Board make a declaratory finding regarding the rural exemptions claimed by Aventure Communication Technology, LLC, and Great Lakes Communication Corp. Qwest has asked the Board to make a finding pertaining to the federal rural exemptions claimed by those companies. The rural exemption provisions that Qwest refers to relate to interstate access charges. Our jurisdiction in this matter is limited to intrastate access charges. So, no finding on this matter is appropriate; however, I think we should refer the issue to the FCC because the evidence in our record would support a finding that Great Lakes failed to satisfy the requirements for the rural exemption in its claim.

This shows the Board is well aware of its jurisdiction, and intends to refer the issue to the FCC.

10. Movants argue that the Board has no authority over numbering resources. FCC rules and decisions show otherwise. FCC rules state:

> (2) State commissions may investigate and determine whether service providers have activated their numbering resources and may request proof from all service providers that numbering resources have been activated and assignment of telephone numbers has commenced.
>
> * * *
>
> (5) The NANPA and the Pooling Administrator shall abide by the state commission's determination to reclaim numbering resources if the state commission is satisfied that the service provider has not activated and commenced assignment to <u>end users</u> of their

numbering resources within six months of receipt.

47 C.F.R. § 52.15(i)(2), (5) (emphasis added). *See Third Report & Order & Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, In re Numbering Res. Optimization,* 17 F.C.C.R. 252, 297, (2001) ("[I]n recognition that states can serve a valuable role in helping the Commission to monitor carriers' number use, we clarify that states may conduct audits, at their own expense, to determine whether a particular carrier is in compliance with the Commission's numbering rules to discharge their own responsibilities."); *First Order, In re Numbering Res. Optimization,* 15 F.C.C.R. 7574, 7606-07 (2000) ("We do not intend, however, to supplant independent state authority exercised pursuant to state law unrelated to number administration."); *Cf., Iowa Telecom. Services, Inc. v. South Slope Co-op. Tel. Co.,* 2007 WL 4039630, 5 -6 (I.U.B. Jan. 23, 2007) (finding Board authority to require Iowa carrier to conform to FCC's requirements for local number porting). The Board also has authority under state law "to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted..." Iowa Code § 476.2(4). These are the exact authorities given to the Board in Qwest's post-hearing brief. The Board has authority to act regarding numbering resources, and claims to the contrary are unavailing.

12. Great Lakes and Superior claim that Qwest's Recommended Finding No. 12 stated LECs must immediately cease to bill Qwest for "interstate and intrastate switched access." Qwest's proposed finding did not use the word interstate at all. Once again, Movants inserted verbiage not contained in Qwest's proposed findings.

13. Finally, Movants state that Qwest's Recommended Finding No. 36 states that it should make plain the decision should be "binding precedent" on "any future traffic pumping case." Qwest's post-hearing brief sets forth what it seeks. Qwest stated that the Board's order should contain language that all certificated Iowa LECs should understand that traffic pumping violates "Iowa law." Again, the Board has clear authority to set the standards to obtain a certificate of authority to provide local exchange telecommunications services in Iowa, and to hold the LECas

to those standards.

Movants make two additional arguments in footnotes. First they state "Qwest did not seek to hide the fact that it is asking the Board to regulate the rates of the LEC Respondents. Motion at 12, n. 24. Nothing could be further from the truth. To make this point, they cite to testimony from Qwest's expert, Jeff Owens. Mr. Owens testified that he had not "investigated whether the NECA rate itself is an appropriate rate when applied appropriately, no, I have not looked into that." IUB Hearing Tr. at 567:12-20. He then stated that the only issue related to rates was his finding that two CLECs did not meet the FCC's rural exemption. *Id.* at 567:21-568:16. As stated above, the Board has concluded it will not make a finding regarding the rural exemption.

Great Lakes and Superior's final factual argument is that Qwest states that the entire case is premised upon whether the "interstate tariff" applies to the calls in question. Motion at 12, n. 25. Again, as an initial matter, the intrastate access tariff simply adopts the language from the interstate tariff; as such, to determine whether intrastate access charges apply, one must interpret the federal tariff. Moreover, Great Lakes and Superior take the transcript completely out of context. The questions that led to the cited testimony are that the LEC's interstate tariff contains mandatory charges that must be assessed to all end users that purchase services from the LEC Respondents' ***local exchange tariffs***. IUB Hearing Tr. at 611:3-14. Mr. Owens then states:

> So if the FCSC partners were considered to have purchased local-exchange service under, in this case, Great Lakes' local tariff, then Great Lakes' interstate tariff obligates it to assess the end-user common-line charge, but Great Lakes did not do so, and neither did any other LEC in this proceeding, until after this complaint was filed, and that's consistent with the notion that the FCSC partners were not receiving service pursuant to the LEC's local-exchange tariff..."

Id. at 611:15-24. In other words, Qwest presented the LECs' failure to bill mandatory charges from their federal tariffs as evidence that the FCSCs were not customers under the LECs' local exchange tariffs. Again, it goes without saying that the Board can determine whether or not the LECs are providing local exchange services pursuant to their local exchange tariffs.

Movants FCC Petition even goes so far as to represent to the FCC that they are "constrained from appending" Qwest's proposed findings and conclusions because "Qwest has asserted confidentiality over some portions of these documents." FCC Petition at 10, n. 22. As the Board knows, there is precious little material that Qwest sought to protect as confidential in the hearing record; the LECs – including Great Lakes and Superior – and their FCSC partners produced virtually every document in this case as "confidential" subject to protective agreements. As such, until the Board orders that the material does not warrant confidential treatment, Qwest is legally obligated to maintain the material as confidential. Qwest is more than prepared to turn over the entire Iowa record to the FCC; however, at every turn, the LECs have fought Qwest's efforts to get this material before the FCC. Only now, when the facts underlying the LECs' illegal traffic pumping scheme are on the verge of becoming public by Board order, do Great Lakes and Superior cry foul.

It is abundantly clear that Movants do not accurately represent to the FCC either the Board's intended order or Qwest's proposed findings and conclusions. Instead, they fill the Petition with mischaracterizations in order to trump up baseless jurisdictional arguments. The Board should find that Movants utterly fail to show a stay of the incipient order or this proceeding is warranted.

D. The Communications Act's Dual Regulatory System Specifically Contemplates that State Commissions Will Regulate Local and Intrastate Services, Even When It Impacts Interstate Calling.

Given the Board's clear jurisdictional authority, Movants are left to argue that the Board's expected written order will exceed its jurisdictional authority because it will have an impact on interstate calling to FCSCs. Movants' argument is inconceivable on its face. There are no telecommunications matters whose effects are solely contained in a particular state: *i.e.*, a local exchange carrier by definition cannot provide solely local and intrastate service but must necessarily also provide for access to interstate calling. The Movants' view of the FCC would have the FCC swallowing the state commissions whole, making the state commissions effectively just delegatees of authority from the FCC. That view is contrary to the law. The Communications Act itself recognizes that since the beginning of telecommunications, states have regulated telecommunications alongside the federal government. *See*

Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 369-370 (1986) (citing McKenna, Pre-Emption Under the Communications Act, 37 Fed.Comm.L.J. 1, 12-18 (1985)); *see also* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U .L.Rev. 1692, 1739 (2001) (quoted *e.g.*, in *BellSouth Telecommc'ns, Inc. v. Sanford*, 494 F.3d 439, 448 (4th Cir. 2007), "where the FCC does not mandate a national approach to interpreting and applying the Telecom Act, state agencies are left with considerable flexibility to do so, albeit subject to federal court review," note omitted).

The Communications Act itself bars the FCC from regulating "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). ***Given that the LEC Respondents' practices and actions at issue in this case are "for or in connection with intrastate communication service", the Communications Act provides the Board with express authority to act.***

Movants nonetheless cite Section 152 as though it supports the FCC having exclusive jurisdiction over any matter that affects interstate calling and cite *Louisiana PSC* in support. Movants have simply ignored the express limitations of FCC jurisdiction in section 152(b), and the holding in *Louisiana PSC*, which recognized the importance of state commissions regulating local and intrastate matters:

> The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. *Rice v. Santa Fe Elevator Corp., supra.* The Act itself declares that its purpose is "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. § 151. In order to accomplish this goal, Congress created the FCC to centralize and consolidate the regulatory responsibility that had previously been the province of the Interstate Commerce Commission and the Federal Radio Commission under predecessor statutes. See generally McKenna, Pre-Emption Under the Communications Act, 37 Fed.Comm.L.J. 1, 12-18 (1985). To this degree, § 151 may be read as lending some support to respondents' position that state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act.
>
> We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b). Again, that section asserts that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or

> regulations for or in connection with intrastate communication service...." ***By its terms, this provision fences off from FCC reach or regulation intrastate matters-indeed, including matters "in connection with" intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.***

Louisiana PSC, 476 U.S. at 369-370 (emphasis added). Thus, the United States Supreme Court recognizes that state commissions have the critical role in regulating local and intrastate communications, the very thing the Board is doing in this case. *See also Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006), *cert. den'd* 127 S. Ct. 2255 (2007) (Board authorized to find that intraMTA traffic was not subject to switched access charges under federal tariffs); *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619, 626 (8th Cir. 2007) (Board acted within its authority in requiring LECs to allow customers to make intraMTA calls as local calls); *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 448 (4th Cir. 2007) (collecting several sections of Title 47 regarding "role of state agencies ... [as] an important part of the entire regulatory scheme.").

Indeed, the very argument made by the Movants here – that the state commissions cannot act when the decision will impact interstate calling – has already been rejected in the context of slamming/cramming:

> While it is certainly true that the FCC has jurisdiction to take consumer complaints about cramming, see 47 U.S.C. § 207, it does not necessarily follow that the states may not also investigate such complaints. In fact, the FCC recognized the important role of the states in *Vonage*, a decision declared by the Eighth Circuit to be binding on the federal courts. ... But, ***the FCC noted, "states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints." Id. In a statement attached to the Vonage Order, FCC Chairman Michael K. Powell observed that the states play an important role in combating the practices of slamming and cramming:***
>
> > ***There will remain very important questions about emergency services, consumer protections from waste, fraud and abuse and recovering the fair costs of the network. It is not true that states are or should be complete bystanders with regard to these issues. Indeed, there is a long tradition of federal/state partnership in addressing such issues, even with regard to interstate services....***
>
> Vonage Order, Statement of Chairman Michael K. Powell. While the cases and FCC orders cited by One Call might indeed lend support to One Call's claim for federal

> preemption, none of them establish a "facially conclusive" case for preemption at this stage in the proceedings.

OCMC, Inc. v. Norris, 428 F. Supp. 2d 930, 938-939 (S.D. Iowa 2006) (note omitted; emphasis added); *see also In re: Iowa Telecommunications Services, Inc., v. South Slope Cooperative Tel. Co.*, 2007 Iowa PUC LEXIS 15, 6-9, Docket No. FCU-06-25 (Iowa Utilities Board January 23, 2007) (interpreting federal law and applying same to question of whether Iowa LEC was a CLEC in certain exchanges). Ironically, despite the plain meaning of the FCC's and Eighth Circuit's *Vonage* decisions – which the OCMC court cites in support of state commissions having authority to stop abuses that involve both intrastate and interstate conduct – Movants continue to cite the *Vonage* cases as though they support the opposite conclusion, that the FCC has sole jurisdiction.

Like *OCMC*, in *Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2nd Cir. 2006), the Second Circuit found state commissions could exercise its intrastate authority to bar the practice of disguising the nature of traffic through a virtual NXX without encroaching on FCC jurisdiction, even though the petitioner had intended to use virtual NXX for both intrastate and interstate calls:

> Similarly, ***the Board's virtual NXX decision here does not constitute a general barrier to entry as proscribed by 47 U.S.C. § 253, since a prohibition of virtual NXX does not necessarily prevent Global from entering the market.*** In some circumstances, certain state prohibitions may run afoul of § 253(a), even if these prohibitions are not total. *See TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 81-82 (2d Cir.2002). But analysis here must proceed on a case-by-case basis, and while a prohibition of virtual NXX might once have been fatal to Global, its counsel conceded at oral argument that such is no longer the case. ***Contrary to Global's contentions, neither 47 U.S.C. § 253 nor 47 C.F.R. § 63.01 confers blanket authority on carriers to provide any interstate service in any manner unfettered by state regulation.***

454 F.3d at 102-103 (emphasis added, footnotes omitted).

Just as in *Global NAPS*, the Board is exercising its authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). The Board is not attempting to set interstate rates. The Board's decision will simply prohibit the LEC Respondents from violating their local tariffs, their state tariffs, their certificates of authority, as well as Iowa law and regulation, each of which they have violated by billing Qwest for

access services that the Respondents did not provide. In sum, the Board has full jurisdictional scope to hear and address all of the following violations of Respondents' switched access tariffs.

E. The Movants' Arguments that the Board's Anticipated Decision is a Collateral Attack on Existing FCC Precedent Are Frivolous.

Qwest also asked the Board to find that Farmers and Merchants manufactured evidence to deceive the FCC, Qwest, and the Board. The Board has clear authority to make any and all factual findings regarding local exchange services, and especially so here because Merchants purpose was to make it falsely appear that the FCSCs were purchasing services from its local exchange tariffs. In response, Movants claim that Qwest's case is simply a collateral attack on FCC decisions which Movants describe as "indistinguishable." Once again, to make these arguments, Movants misrepresent the status of the FCC's *Merchants* decision, and misrepresent the holdings of the *Jefferson* line of cases.

Movants argue the Board must follow *Merchants* because it is a final order and decided all of the issues in the case before the Board. Movants are incorrect on both counts. As to finality, the FCC granted reconsideration in part stating as follows:

> When we ruled on whether Farmers properly charged Qwest terminating access for calls to the conference calling companies, ***a key issue was whether those companies were "end users."*** That question, in turn, depended on whether the companies were customers that "subscribe[d] to the services offered under [Farmers'] tariff." ***We found that the conference calling companies did subscribe to services under Farmers' tariff based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge.*** Qwest now calls that representation into question, however, by pointing out that Farmers' invoices to, and agreements with, the conference calling companies were backdated. In fact, Qwest suggests that this backdating may have occurred after the legality of Farmers' access charges was called into question. According to Qwest, this backdating indicates that the conference calling companies were *not* Farmers' customers during the relevant time period, but rather were its business partners. (emphasis added).

Merchants Jan. 29, 2008 Order on Reconsideration at ¶7. As a result of the manufactured evidence, the FCC granted reconsideration stating twice that the "integrity of its process" was at stake. *Id.* at ¶¶ 8 & 11.

In granting Qwest's motion to reconsider, the FCC's first ordering clause stated that "Accordingly, it is ordered, pursuant to ... 47 C.F.R. § 1.106, that Qwest's Petition for Partial Reconsideration is granted in part to the extent indicated herein." Rule 1.106 states:

> (k)(1) ***If the Commission ... grants the petition for reconsideration in whole or in part,***

it may, in its decision:

***

> (iii) ***Order such other proceedings as may be necessary or appropriate. If the Commission or designated authority initiates further proceedings, a ruling on the merits of the matter will be deferred pending completion of such proceedings.*** Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings, including rehearing, as may be appropriate.

47 C.F.R. § 1.106(k)(1)(iii) (emphasis added). This regulation thus expressly states that when the FCC opens further proceedings to reconsider an order, "a ruling on the merits" is deferred. Accordingly, because the FCC ruled on the petition for reconsideration by opening a further proceeding under Rule 1.106, the 2007 *Merchants* decision is not final. ***Indeed, the FCC made quite explicit that its decision was not to be used as precedent***:

> Moreover ,... the holding in the *Qwest v. Farmers Order* is subject to reconsideration on the factual issue of whether the conference calling companies were end users under Farmer's tariffs. ***We, therefore, conclude that the prior precedent cited by InterCall does not support a finding that InterCall is an end user for purposes of direct USF contribution obligations.*** (emphasis added).

In re InterCall, Inc., 23 FCC Rcd. 10731, ¶21, 2008 WL 2597359 (Rel'd June 30, 2008) (note omitted). Indeed, the federal district court for the District of South Dakota has ruled *Merchants* is not final:

> [T]his Court is not convinced that FCC's October 2, 2007 decision in *Farmers & Merchants* is at this time properly characterized as settled precedent. Although more than five months have passed since Qwest submitted its amended petition, this Court believes it is as likely that the passage of time indicates that the FCC is in some way modifying its *Farmers and Merchants* decision as it is that the FCC has determined that the decision will remain unmodified without having issued an order stating the same.

Sancom, Inc. v. Sprint Commc'ns LP, 2009 WL 903720 (D.S.D. March 30, 2009). *See also Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, 2009 WL 2155930, *2 (D. Minn. July 15, 2009) ("the FCC subsequently granted reconsideration of the matter and has yet to issue any final decision," citing the FCC's 2008 reconsideration order). Given that *Merchants* is not a final decision, it is not precedent for the Board to follow.

Moreover, in *Merchants* the FCC did not decide several issues that are requirements to assess switched access charges. Movants act as though the FCC's original *Merchants* decision addressed every

conceivable issue. FCC Petition at 24. As the Board knows, by rule the FCC can only decide the issues before it. Movants go so far as to state that the FCC decided that Merchants had provided its FCSC partners with local exchange service, and that the calls had been delivered to an end-user premises. FCC Petition at 24. Neither of these issues was ever presented or even considered in *Merchants*.

Movants also willfully ignore that Merchants manufactured invoices ***to make it appear that the FCSCs had paid EUCL charges, federal universal service charge, TI charges from the local tariff, and charges for collocation and power***. On reconsideration, the FCC stated that it had relied upon this misrepresentation: "We found that the conference calling companies did subscribe to services under Farmers' tariff ***based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge***." *Merchants Reconsideration* at ¶8. Thus, in *Merchants* Qwest was under the impression that the FCSCs has purchased service from Merchants, that mandatory charges had issued from local and interstate tariffs, and therefore Qwest argued that even though the FCSCs purchased and paid for service, they were not end users because the payments exchanged between the companies left the FCSCs receiving more than they were paying. The FCC rejected this position. *Merchants* at ¶37-38. This is very different than the issue before the Board where the evidence shows the LECs billed nothing, expected no payments, and that netting for local services never occurred.

Movants' attempt to rely upon *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001), and its progeny is equally unavailing. The cases do not stand for the propositions cited by Movants. In these cases, AT&T limited its argument to issues raised in a 1996 NPRM and in a "1995 advisory letter issued by the Chief of the Enforcement Division." *Id.* at ¶13. The FCC rejected these two arguments, but stated that the decision was narrow:

> Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. ***We find simply that, based on the specific facts and arguments presented here***, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. ***We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end-user***

customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.

Id at ¶16 (emphasis added). Indeed, the FCC specifically stated that no one alleged that Jefferson discriminated by treating its conferencing partner different than true end-user customers. *Id.* at ¶15. In other words, the *Jefferson* decision did not address any of the questions at issue before the Board in this proceeding.

III. MOVANTS ALSO FAIL TO MEET THE OTHER REQUIREMENTS TO OBTAIN A STAY.

As shown above, Movants cannot come anywhere close to meeting the primary requirement of a likelihood of success on the Petition. Once the Board determines that, it need go no further with the other three factors for a stay. However, Movants fail to establish each of the remaining requirements as well.

A. The Board's Issuance of the Written Order Will Not Cause Movants Irreparable Injury.

The Movants claim that they will suffer irreparable injury when the Board issues its written order; specifically, they claim they will incur a loss of revenue and perhaps loss of their businesses. Movants do not explain how such losses would occur so swiftly upon issuance that the Board should not even issue the order, or if that is the case, why they waited until August 17, 2009 to inform the Board. Even the LECs whose certificates of authority are at issue for revocation (Great Lakes and Aventure) will have a follow-on evidentiary proceeding after the Board issues the order to show cause why the certificates should not be revoked.

In any case, even if the Movants requested a stay of the final order, "'[o]rdinarily, monetary losses caused by either administrative proceeding expenses or the deprivation of earnings are insufficient to constitute irreparable injury of substantial dimension.' ... Even a 'substantial' loss of revenue may 'not amount to irreparable damage.'" *LTDS Corp. v. Iowa Telecommc'ns Serv., Inc.*, 2004 WL 2724118, *4 -5 (Iowa U.B. Oct. 29, 2004), *recon. den'd*, 2004 WL 3369871 (Iowa U.B. Nov 22, 2004) (citing cases); *see also Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008). While loss of revenue *in extremis* – such as going out of business -- could constitute irreparable injury in the unusual case, (*Grinnell*, 751 N.W.2d at 402 (Iowa 2008), loss of a business that is based on clear illegality does not qualify for a stay.

See, e.g., Magnesystems, Inc. v. Nikken, Inc., 1994 WL 808421, *5 (C.D. Cal. August 8, 1994) (denying motion to stay injunction, "Nikken is in no position to complain that its entire business may be destroyed by entry of an injunction if it has built that entire business on an infringing product."); stay on appeal also denied, *Magnesystems Inc. v. Nikken, Inc.*, 36 F.3d 1114 (table); 1994 WL 492511, *3 (Fed. Cir. Aug. 30, 1994) (unofficial opinion). Here, Great Lakes' business is based wholly on unlawful conduct. The same is largely true for Aventure, and the Board's decision can have no impact on Superior's revenue stream because Superior had stopped traffic pumping.[1]

B. A Stay of the Soon-to-Be-Issued Order, or of this Proceeding, Would Substantially Harm Qwest and the Intervenors.

Qwest respectfully states that it will be substantially harmed if the Board delays issuing the incipient order because traffic pumping is ongoing in the state of Iowa, which constitutes ongoing harm to Qwest and other long distance carriers. Qwest filed its complaint two and a half years ago. The proceeding was greatly delayed by Respondents' meritless attempts to dismiss, stay, and avoid discovery. Issuing the written order as soon as possible is necessary so that Iowa traffic pumpers have the confirmation in writing that traffic pumping is unlawful for Iowa LECs.

C. The Public Interest Justifies the Board Issuing the Incipient Order When it Is Ready, and Not Staying the Proceeding.

Several aspects of the Board's anticipated decision concern the public interest. The Board held that various aspects of traffic pumping were contrary to the public interest. Nonetheless, the Movants still argue that a stay and allowing traffic pumping to continue is in the public interest. The public interest plainly weighs in favor of the Board issuing its written order. For example, as long as Movants continue their conduct, they are continuing to make pornographic or adult content calling services available with

[1] Movants also complain of irreparable injury in that they will lose their investment in switch and facility upgrades. Motion at 7-8. Movants do not explain how they would lose those investments simply by the Board issuing its order. If Movants were to succeed on the Petition or appeal (which is highly unlikely, but assuming *arguendo*) then they could resume using those switches and facility upgrades to pump traffic. Movants also ignore that (1) Great Lakes purchased its switch equipment intentionally to engage solely in unlawful conduct, not to provide service to end user customers, and (2) Superior did not do anything to deliver these calls, but simply agreed with Great Lakes to assign telephone numbers to Great Lakes to use for FCSC calls, Great Lakes did not even need to upgrade its network to engage in the unlawful conduct.

no ability for parents to protect their children. Similarly, allowing the Respondents to continue abusing their state certificates of authority and state tariffs would be contrary to the public interest that is codified in the Iowa Code and administrative rules requiring such certificates and tariffs. See *supra* at 5.

IV. THE SUPPLEMENTAL MOTION ERRONEOUSLY PRESUMES THE FCC'S NOTICE FOR COMMENTS SIGNIFIES SUBSTANTIVE SUPPORT OF THE PETITION.

The Supplemental Motion adds nothing persuasive to the Motion: Great Lakes and Superior erroneously infer that the FCC's public notice for comments on the Petition indicates the FCC will rule quickly, or implies the FCC agrees with the Petition. This is absurd. Issuing a notice extending the date for public responses to the Petition is not a smoke signal. Similarly, that the FCC issued the notice four business days after the Petition does not indicate any particular urgency. As an initial matter, under FCC's rules, the public responses otherwise were due ten calendar days after the Petition's filing, *i.e.*, the following Monday, August 24, 2009. Thus, the FCC's notice delayed the filing of comments. Moreover, in several instances, the FCC has similarly asked for public comment shortly after receiving a petition, but allowed those matters to remain unresolved for lengthy time periods.

The only reasonable inference to be drawn from the FCC's August 20 public notice is that the FCC wishes to receive public comments. Nonetheless, Movants speculate that the FCC has signaled it agrees with the Petition. The FCC's decision to extend the comment period by approximately one month could just as reasonably be interpreted to mean the FCC wanted to ensure that comments submitted will address the Board's actual order, instead of rank speculation about what commenters expect the Board's order to contain.

V. CONCLUSION

For each of the reasons shown above, the Movants fail to show that a stay is warranted for either the Board's issuance of a written order, or of the proceeding in general. The Board's jurisdiction over the issues is plain. The Movants' Petition is accordingly highly unlikely to succeed, and Movants fail to show any legitimate, irreparable injury if the Board does not issue the requested stay. The Board should deny the Motion, issue the written order in this action.

Dated: August 28, 2009.

Respectfully submitted,

by 

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CERTIFICATE OF SERVICE

Docket No. FCU-07-02

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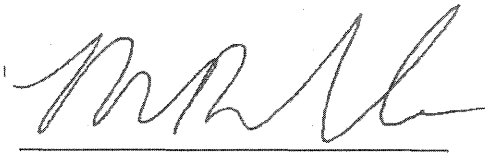
Dated this 28th day of August 2009.



CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS COMPANY, LLC** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-152; 2) served via email on Mr. Doug Slotten at douglas.slotten@fcc.gov and Ms. Lynne Hewitt Engledow at lynne.engledow@fcc.gov of the Federal Communications Commission, Wireline Competition Bureau, Pricing Policy Division; and 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

September 21, 2009